

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL G. HURLEY,

Defendant.

NO. CR15-336 JCC

**UNITED STATES'
TRIAL BRIEF**

The United States of America respectfully submits this Trial Brief.

I. PROCEDURAL BACKGROUND

On September 21, 2015, defendant Paul G. Hurley was arrested and charged by a criminal Complaint with one count of Soliciting and Agreeing to Receive a Bribe by a Public Official, and two counts of Receiving a Bribe by a Public Official, in violation of Title 18, United States Code, Section 201(b)(2). On October 14, 2015, a federal grand jury sitting in the Western District of Washington returned a three-count Indictment charging defendant Hurley with the same offenses.

Defendant's trial is set to commence on February 8, 2016, at 9:30 a.m. At trial, the United States will be represented by Assistant United States Attorneys Justin W. Arnold and Francis Franze-Nakamura. Defendant will be represented by John Henry

1 Browne and Michael Lee. The United States expects to call approximately seven
 2 witnesses, and to introduce approximately less than 50 exhibits. The United States
 3 anticipates that it will be able to present its case-in-chief in approximately two to three
 4 days, depending on the amount of cross-examination by the defense.

5 **II. ELEMENTS OF THE OFFENSES**

6 **Soliciting, Agreeing to Receive, and Receiving a Bribe by a Public Official**

7 The elements of Soliciting, Agreeing to Receive, and Receiving a Bribe by a
 8 Public Official as charged in Counts 1 through 3 of the Indictment, in violation of Title
 9 18, United States Code, Section 201(b)(2), are:

10 First, the defendant was a public official;

11 Second, the defendant solicited, received, or agreed to receive something of value,
 12 in return for being influenced in the performance of an official act or being persuaded to
 13 do or not do an act in violation of defendant's official duty;

14 Third, the defendant acted corruptly, that is, intending to be influenced in the
 15 performance of an official act or to do or omit to do an act in violation of the defendant's
 16 official duty.

17 Title 18, United States Code, Section 201(a)(1) defines a "public official" as a
 18 Member of Congress, Delegate or Resident Commissioner, either before or after such
 19 official has qualified, or an officer or employee or person acting for or on behalf of the
 20 United States, or any department, agency or branch of Government thereof, including the
 21 District of Columbia, in any official function, under or by authority of such department,
 22 agency, or branch of Government.

23 Title 18, United States Code, Section 201(a)(3) defines "official act" as any
 24 decision or action on any question, matter, cause, suit, proceeding or controversy, which
 25 may at any time be pending, or which may be law be brought before any public official,
 26 in such official's official capacity, or in such official's place of trust or profit. At trial,
 27

1 the United States will argue that the “official act” that was the subject of the bribe was
2 defendant Hurley’s preparation of his audit report and the submission of his audit report
3 to his managers.

4 **III. FACTS**

5 The United States anticipates that the evidence at trial will show the following:

6 On June 22, 2009, defendant Hurley began working at the Internal Revenue
7 Service (“IRS”) as revenue agent. From that date through September 24, 2015, defendant
8 Hurley was stationed in the IRS’s Seattle, Washington office. IRS revenue agents are
9 assigned to conduct IRS tax audits on IRS tax returns as part of their official duties. As
10 part of the audit process, IRS Revenue Agents conduct examinations of taxpayers’ tax
11 filings to determine whether the taxpayers correctly reported and paid their tax liability to
12 the IRS. If an IRS Revenue Agent receives cash, the Revenue Agent is instructed to have
13 an IRS employee from another division process the cash and provide a receipt.

14 Throughout his employment as an IRS revenue agent, defendant Hurley received
15 ethics training which included a discussion on the prohibition, with limited exceptions,
16 against soliciting or accepting any gift or other item of monetary value from any person
17 seeking official action from the IRS or whose interests may be substantially affected by
18 the performance or nonperformance of defendant Hurley’s duties. On or about July 20,
19 2015, shortly after he began his examination of Have a Heart Compassion Care, Inc.
20 (“Have a Heart”), defendant Hurley received his annual ethics training, including the
21 prohibition of gifts from outside sources and seeking outside employment.

22 On July 1, 2015, just days before he began his examination of Have a Heart,
23 defendant Hurley’s second-level supervisor, Diane Wittman, gave defendant Hurley a
24 letter notifying him that the IRS was proposing to remove him from the IRS or otherwise
25 discipline him. This proposed removal or discipline resulted from defendant Hurley’s
26 unauthorized access to taxpayer data on three occasions in 2014, on January 23, 2014,

1 October 14, 2014, and October 16, 2014, and his lack of candor in the investigation of his
2 unauthorized access.

3 **The Have a Heart Examination**

4 On or about July 6, 2015, defendant Hurley mailed an official notice to Have a
5 Heart, a medical marijuana business, to the attention of Ryan Kunkel. The July 6th
6 notice informed Mr. Kunkel that Have a Heart's federal tax return for the year ending
7 December 31, 2013, had been selected for examination. The notice, which was signed by
8 defendant Hurley, directed Mr. Kunkel to contact defendant Hurley to discuss the
9 pending examination. According to his internal IRS Activity Record, around the time
10 defendant Hurley mailed the notice to Have a Heart, defendant Hurley conducted
11 research concerning tax issues related to medical marijuana businesses, including the
12 applicability of Internal Revenue Code ("IRC") Section 280E. Section 280E of the IRC
13 prohibits a business trafficking in illegal substances from deducting normal operating
14 expenses when calculating its income tax.

15 As directed by the notice of examination, in the middle of July 2015, Mr. Kunkel
16 contacted defendant Hurley to set up a date for the beginning of the examination. On
17 July 28, 2015, defendant Hurley met with Mr. Kunkel at Have a Heart's office on Aurora
18 Boulevard in Seattle, Washington, to conduct a preliminary interview, and the formal
19 audit began the next day. According to Mr. Kunkel, during these early meetings,
20 defendant Hurley went over the formalities of the examination and told Mr. Kunkel that
21 Have a Heart would be taxed on the business's gross revenue with limited deductions. In
22 addition to the July 29th meeting, defendant Hurley and Mr. Kunkel met at Have a
23 Heart's offices on at least three other occasions during the examination, including August
24 6, 2015, and September 9 and 11, 2015. At some point during the course of the
25 examination, defendant Hurley informed Mr. Kunkel that the examination would be
26 expanded to include Have a Heart's 2014 tax return since the 2014 return would also
27 include Section 280E adjustments.

1 The last examination meeting between defendant Hurley and Mr. Kunkel took
2 place on September 11, 2015 at Have a Heart's offices. During this meeting, defendant
3 Hurley gave Mr. Kunkel the results of the examination on a Form 4549, Income Tax
4 Examination Changes. Defendant Hurley told Mr. Kunkel that he could accept the
5 amount listed on the form, or he could appeal it. Mr. Kunkel told defendant Hurley he
6 agreed to the amount and signed the form, which defendant Hurley also signed. The
7 Form 4549 includes the following statement, among others:

8 "Consent to Assessment and Collection – I do not wish to exercise my
9 appeal rights with the Internal Revenue Service or to contest in the United
10 States Tax Court the findings in this report. Therefore, I give my consent to
11 the immediate assessment and collection of any increase in tax and
12 penalties, and accept any decrease in tax and penalties shown above, plus
13 additional interest as provided by law. It is understood that this report is
subject to acceptance by the Area Director, Area Manager, Specialty Tax
Program Chief, or Director of Field Operations."

14 According to Diane Wittman, defendant Hurley's second-level supervisor at the
15 IRS, when a revenue agent concludes a case and presents the taxpayer with a proposed
16 assessment it is done on an IRS Form 4549. If the revenue agent signs the form, and the
17 taxpayer signs the form in agreement with the assessment, the Form 4549 is then
18 submitted by the revenue agent to an IRS manager for review along with additional
19 paperwork related to the audit. The proposed action on the Form 4549 is not finalized or
20 assessed until an IRS manager approves the Form 4549, and a case processing unit in an
21 IRS Service Center also reviews the recommended action listed on the Form 4549 and
22 approves the assessment.

23 Ms. Wittman will also testify about the procedures a revenue agent takes to
24 complete and submit an audit to an IRS manager for review. These procedures include
25 the assembly of the agent's "Examination Workpapers" which contain the agent's
26 analysis and other documents related to the audit. Using her 28 years of experience with
27 the IRS, Ms. Wittman will briefly explain the documents contained in Paul Hurley's

1 examination workpapers. She will also highlight the portions of the workpapers that
2 indicate when defendant Hurley submitted the workpapers for review by a manager.

3 Shortly after defendant Hurley and Mr. Kunkel signed the Form 4549, Mr. Kunkel
4 asked defendant Hurley if he could ask defendant Hurley a question “off the record.”
5 Defendant Hurley said yes, and Mr. Kunkel asked defendant Hurley a tax question
6 involving an unrelated business. Immediately thereafter, defendant Hurley asked Mr.
7 Kunkel if he could ask a question “off the record.”

8 According to Mr. Kunkel, defendant Hurley said that he had saved Mr. Kunkel
9 over \$1 million in the examination. According to Mr. Kunkel, defendant Hurley had
10 previously talked about his student loan debt and being unhappy at the IRS. According to
11 Mr. Kunkel, he suspected defendant Hurley was proposing that Mr. Kunkel make a
12 personal payment to defendant Hurley. Mr. Kunkel rubbed his fingers together and
13 looked at defendant Hurley to see if that was his intention. Defendant Hurley responded
14 by stating “20,” which Mr. Kunkel understood to mean \$20,000.

15 At that point, Mr. Kunkel asked defendant Hurley how he wanted the payment,
16 and defendant Hurley responded that he wanted Mr. Kunkel to pay off his student loans
17 in small amounts over time. Mr. Kunkel told defendant Hurley that he did not think that
18 was a good idea. Defendant Hurley then said he wanted cash. According to Mr. Kunkel,
19 he was worried that defendant Hurley would not present the signed Form 4549 unless he
20 agreed to make the payment. As a result, Mr. Kunkel agreed to pay defendant Hurley the
21 \$20,000 and suggested meeting at a Starbucks in Seattle, Washington, at 8:00 a.m. on
22 September 16, 2015, to make the payment. Defendant Hurley agreed, and told Mr.
23 Kunkel not to tell anyone, not even his business partner.

24 According to the activity record in defendant Hurley’s examination workpapers,
25 he met with an IRS supervisor on September 14, 2015, and told the supervisor that he had
26 received an agreed Form 4549. The Activity Record indicates that the case would close
27 by September 18, 2015. The Activity Record entry for September 15, 2015, reflects that

1 defendant Hurley conducted a number of steps to present the case file to his manager for
2 approval, including, among other things: “completed the remaining workpapers and
3 printed to case file,” “reconciled time analysis and bound case file,” and “submitted
4 physical case file to GM for closure.”

5 **Mr. Kunkel Reports Defendant Hurley’s Solicitation to Law Enforcement**

6 Contrary to defendant Hurley’s admonition not to tell anyone, Mr. Kunkel
7 informed Stephen Round, an employee of a security firm that Mr. Kunkel had previously
8 retained, of defendant Hurley’s solicitation. Mr. Round told Mr. Kunkel that he needed
9 to discuss the matter with an attorney and contact law enforcement. On the morning of
10 September 15, 2015, Mr. Kunkel’s attorney, Robert Chadwell, contacted the U.S.
11 Attorney’s Office to report the solicitation. That afternoon, Mr. Kunkel was interviewed
12 by Assistant United States Attorney Justin Arnold, FBI Special Agent Bruce Reynolds,
13 and TIGTA Special Agent Julie Anderson in the presence of Mr. Chadwell and Jack
14 Guthrie, an associate of Mr. Chadwell.

15 **The September 16, 2015 Payment**

16 After Mr. Kunkel was interviewed in the afternoon of September 15, 2015, he
17 agreed to meet with defendant Hurley at the prearranged time on September 16, 2015
18 under observation by Special Agents. On September 16, 2015, FBI Special Agents gave
19 \$5,000 to Mr. Kunkel provide to defendant Hurley. Mr. Kunkel secured the money in a
20 manila envelope in the presence of FBI Special Agents. FBI Special Agents placed an
21 audio recording device on Mr. Kunkel and activated it prior to his meeting with the
22 defendant.

23 Two FBI Special Agents, one of whom was utilizing a video recording device,
24 observed Mr. Kunkel sitting at a table inside the Starbucks located in Seattle,
25 Washington. At approximately 7:30 a.m., Mr. Kunkel held up the manila envelope
26 containing the \$5,000 cash for the Special Agents conducting surveillance to see, and Mr.
27

1 Kunkel placed the envelope in a newspaper and placed both items on the table in front of
2 him.

3 At approximately 7:51 a.m., Special Agents observed a Honda Accord 4-door
4 sedan, bearing Washington license plate ARE919, pull into the parking lot of the
5 Starbucks. Defendant Hurley is the registered owner of that vehicle. At approximately
6 7:53 a.m., Special Agents observed defendant Hurley exit his car and walk into the
7 Starbucks wearing a backpack. At approximately 7:56 a.m., Special Agents observed
8 defendant Hurley sit down at the table with Mr. Kunkel where they engaged in
9 conversation.

10 At approximately 8:02 a.m., Special Agents observed defendant Hurley and Mr.
11 Kunkel stand up from the table. As Mr. Kunkel put on his jacket, defendant Hurley sat
12 back down, opened his backpack, took the envelope of money inside the newspaper on
13 the table and placed both items together inside of his backpack. Defendant Hurley stood
14 up again and both he and Mr. Kunkel departed the Starbucks. Defendant Hurley and Mr.
15 Kunkel then began smoking cigarettes outside of the entrance to the Starbucks where
16 they engaged in further conversation.

17 At approximately 8:11 a.m., Special Agents observed defendant Hurley walk away
18 from Mr. Kunkel and walk to his car. Defendant Hurley put the backpack containing the
19 envelope of money inside the trunk of his Honda Accord and drove away.

20 Shortly thereafter, Special Agents debriefed Mr. Kunkel about the meeting.
21 During the debriefing, Mr. Kunkel told the Special Agents that he had told defendant
22 Hurley that he was worried about getting into trouble for making the payment.
23 According to Mr. Kunkel, defendant Hurley replied, in sum and substance, "You're not
24 in trouble. I brought this up to you. I'm the one that is going to get into trouble. You
25 didn't bring it to me. We're fine. It's good."

26 After the meeting, Special Agents reviewed the audio recording of the meeting.
27 Large portions of the recording are difficult to hear because of background noise, but the

1 recording included the following conversation between Mr. Kunkel and defendant
 2 Hurley. On a portion of the recording, defendant Hurley is heard saying: “I, I finished...I
 3 finished closing everything out, got it all wrapped up and stuck it in my manager’s box
 4 yesterday...late yesterday,” and “She’s not in today...which is good...so that means the
 5 afternoon manager comes in and reviews in...and that’s just rubberstamping it. So
 6 there’s no problem there. It...that’s good...it gets forwarded up.”

7 Another portion of the recording includes the following exchange where Mr.
 8 Kunkel said, “I gotta split...this is the other part I was gonna tell you, I’ll give you 5
 9 [meaning thousand dollars] today, don’t freak out on me...I’m gonna give you more.
 10 Can you give me until Monday and I’ll get you the rest? Part of me was scared that if I
 11 hand you 20k... I’m like is this guy going to get fucking pulled over and freak out.” On
 12 the recording, defendant Hurley replied: “I’ll just throw it in the trunk and no record or
 13 nothing.” On the recording, Mr. Kunkel said, “Monday, I’ll get you the rest 100%.” .
 14 Kunkel and defendant Hurley agreed to meet again at the same Starbucks location on
 15 Monday, September 21, 2015, at 8:00 a.m. for Mr. Kunkel to provide the rest of the
 16 \$20,000.

17 **The September 21, 2015 Payment**

18 On September 21, 2015, at approximately 8:00 a.m., Mr. Kunkel met with
 19 defendant Hurley inside of Mr. Kunkel’s vehicle in the parking lot of the Seattle
 20 Starbucks where the two had previously met on September 16, 2015. An audio recording
 21 device was placed on Mr. Kunkel, along with audio and video recording devices that
 22 were placed in his vehicle. All of the devices were activated prior to Mr. Kunkel’s
 23 meeting with defendant Hurley. On September 21, 2015, Mr. Kunkel was provided with
 24 \$15,000 cash by TIGTA Special Agents, which he placed in a manila envelope in the
 25 presence of TIGTA Special Agents.

26 At approximately 7:55 a.m., Special Agents observed defendant Hurley’s Honda
 27 Accord 4-door sedan bearing Washington license plate ARE919 pull into the parking lot

1 of the Starbucks. Defendant Hurley grabbed his backpack and then got inside of Mr.
2 Kunkel's vehicle.

3 The audio and video recording taken inside Mr. Kunkel's car reveals that Mr.
4 Kunkel had placed the manila envelope containing the \$15,000 under the passenger seat
5 where defendant Hurley was sitting. At the outset of the meeting in the car, defendant
6 Hurley and Mr. Kunkel discussed an IRS form concerning paying by the electronic
7 payment system. Shortly thereafter, Mr. Kunkel told defendant Hurley that he had a
8 friend who owned a dispensary in Everett who was going through an examination.
9 During the discussion, defendant Hurley said, "It's not going to be as kind for him" and
10 "He's going to get railed, dude." In response, Mr. Kunkel stated, in part, "Hopefully,
11 he's as fortunate to get a guy like you and we'll see" to which defendant Hurley
12 responded, "Get a guy like me? They don't exist. Guys like me don't exist."

13 Later, Mr. Kunkel told defendant Hurley, "That's - I put down there under your
14 seat, by the way." At that point, defendant Hurley reached under the seat, grabbed the
15 manila envelope containing the cash, and placed it inside his backpack. Immediately
16 thereafter, Mr. Kunkel asked defendant Hurley, "So we're good. So nothing weird pops
17 up or if it does, can I get ahold of you?" Defendant Hurley responds by directing Mr.
18 Kunkel to "write [him] snail mail" at defendant Hurley's home address. Later, Mr.
19 Kunkel again asked, "You think we're going to be okay, though?" and defendant Hurley
20 responded, "I'm 99.99 percent sure we're good. I mean there's --- there's really no
21 fucking chance of it. It's already been closed up by a manager. Got closed out, like, that
22 same day."

23 At approximately, 8:10 a.m., defendant Hurley exited Mr. Kunkel's vehicle
24 carrying a backpack. Special Agents then arrested the defendant without incident. In a
25 search incident to arrest, Special Agents searched defendant Hurley and his backpack.
26 Special Agents located the manila envelope containing \$15,000 cash inside of defendant
27 Hurley's backpack. Special Agents also located four (4) U.S. Twenty Dollar bills inside

1 of defendant Hurley's wallet. Three (3) of the serial numbers for U.S. Twenty Dollar
 2 bills matched the serial numbers of the U.S. Twenty Dollar bills paid by Mr. Kunkel to
 3 defendant Hurley during the September 16, 2015 bribe payment.

4 On September 24, 2015, three days after his arrest, defendant Hurley emailed and
 5 mailed a resignation letter to Sara DeAnda, his IRS supervisor. In his resignation letter,
 6 defendant Hurley wrote, among other things,

7 "It is with a heavy heart, immeasurable regret [sic], and unfathomable
 8 remorse that I must resign from the Internal Revenue Service. My recent
 9 actions have no place in the Federal Service and there is no way I could
 10 possibly write an apology to express the dissatisfaction and disgust I have
 11 within myself. I have let everyone down in the Seattle office and all across
 12 the United States and have brought a cloud of shame to the Internal
 13 Revenue Service. To resign is unquestionably the right thing to do."

14 IV. LEGAL ISSUES

15 A. The United States Need Not Prove that Defendant Hurley Actually Performed 16 the Official Act that Was the Subject of the Bribe

17 The bribery statute centers on "taking or agreeing to take money for a promise to
 18 act in a certain way." *United States v. Brewster*, 408 U.S. 501, 526 (1972). Although the
 19 statute requires the government to establish that defendant Hurley agreed to be influenced
 20 in the performance of an official act, the statute does not require the government to prove
 21 that defendant Hurley actually performed the official act. As explained by the Supreme
 22 Court, "[t]here is no need for the Government to show that appellee fulfilled the alleged
 23 illegal bargain; acceptance of the bribe is the violation of the statute, not performance of
 24 the illegal promise." *Id.* (examining 18 U.S.C. § 201(c)).

25 Because it is irrelevant whether defendant Hurley performed the official act, it
 26 would be improper for the defense to present evidence or argument regarding defendant
 27 Hurley's failure to perform the official act. For example, it would be improper for the
 28 defense to present evidence that the bribe did not cause defendant Hurley to alter his

1 conduct, or that defendant Hurley lacked the power to accomplish the official act he
2 promised to Mr. Kunkel.

3 This evidence is barred by Federal Rules of Evidence 402 and 403. Federal Rule
4 of Evidence 402 provides that evidence which is not relevant is not admissible. Evidence
5 that neither negates an element of the charges against a defendant nor establishes a
6 defense is not relevant. Because evidence regarding the performance of the agreed upon
7 official act neither negates an element of the crime of bribery nor establishes a defense,
8 such evidence is not relevant.

9 Even if such evidence were relevant, Federal Rule Evidence 403 would bar its
10 admission because the evidence would confuse the issues, mislead the jury and cause
11 undue delay. *See United States v. Olano*, 62 F.3d 1180, 1204 (9th Cir. 1995), *cert.*
12 *denied*, 519 U.S. 931 (1996). The trial court has broad discretion in determining
13 admissibility under Rule 403. *Id.*, 62 F.3d at 1204; *United States v. Moore*, 552 F.2d
14 1068, 1079 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976). An area of common
15 exclusion involves attempts to confuse the issues or mislead the jury by introducing
16 evidence of matters that do not establish a defense to the charged crimes. *Olano*, 62 F.3d
17 at 1204-05; *United States v. Perkins*, 937 F.2d 1397, 1401 (9th Cir. 1991); *see also*
18 *United States v. Tidwell*, 559 F.2d 262, 266-67 (5th Cir. 1977), *cert. denied*, 435 U.S. 942
19 (1978) (excluding evidence that defendant's manipulation of bank funds was beneficial to
20 bank on grounds of danger of confusion of issues and misleading jury where belief in
21 benefit to bank was not a defense to misapplication of funds).

22 **B. It Is Not a Defense that the Official Act Was Legal or that Defendant Hurley**
23 **Would Have Undertaken the Official Act Even if Kunkel Had Refused to Pay the**
24 **Bribe**

25 Pursuant to the Supreme Court's ruling in *Brewster*, it would be improper for the
26 defense to present evidence or argument that the bribe did not cause defendant Hurley to
27 alter his examination work papers or otherwise deviate from standard audit practice. It is

1 not a defense to the crime of bribery that the official act that is the subject of the bribe
2 was actually lawful or even beneficial to the public. *See United States v. Dorri*, 15 F.3d
3 888, 890 (9th Cir. 1994) (affirming bribery conviction where the jury was instructed that
4 it is “not a defense to the crime of bribery . . . that the demand of something of value was
5 made by the public official to influence an official act which is actually lawful, desirable
6 or even beneficial to the public”) (citation omitted). Nor is it a defense that defendant
7 Hurley would have submitted and defended his audit report even in the absence of the
8 bribe. *United States v. Quinn*, 359 F.3d 666, 675 (4th Cir. 2004).

9 In *Quinn*, the defendants challenged their bribery convictions on the ground that
10 the district court gave an instruction that allowed the jury to reach guilty verdicts even
11 when there was evidence that the defendants were merely carrying out their ordinary
12 responsibilities and would have undertaken their official actions irrespective of the
13 bribes. 359 F.3d at 674-75. The challenged instruction stated, in pertinent part:

14 It is not a defense that the official act sought to be influenced would have
15 been done anyway regardless of the fact that the bribe was received or
16 accepted. That is to say, even if the defendant acted as he or she normally
17 would if the bribe had not been requested, the crime of bribery has still
been committed.

18 359 F.3d at 675. The Fourth Circuit found the instruction to be appropriate. The court
19 rejected the defendants’ argument because the government does not need to establish that
20 the official act offered in exchange for the bribe was “harmful to the government or
21 inconsistent with the official’s legal obligations.” *Id.* (citing *United States v. Miller*, 340
22 F.2d 421, 424 (4th Cir. 1965). The court explained that, “[b]y the same reasoning, it does
23 not matter whether the government official would have to change his or her conduct to
24 satisfy the payor’s expectations.” *Id.* (footnote omitted).

C. It Is Not a Defense that Defendant Hurley Lacked Authority to Undertake the Official Act or that He Never Intended to Undertake the Official Act

As set forth above, the United States anticipates eliciting testimony from Diane Wittman about the role of an IRS revenue agent in the audit process. Ms. Wittman will testify that revenue agents act relatively autonomously during their audits, and are given discretion to determine whether adjustments to the taxpayers' returns are warranted. While this evidence is admissible to demonstrate what role a revenue agent has in the examination, the United States does not need to prove that defendant Hurley actually had the authority to ensure that Have a Heart would receive favorable treatment during the audit. Therefore, it would be improper for the defense to present evidence that defendant Hurley, as a revenue agent, lacked the authority to ensure that Have a Heart would receive favorable treatment in his audit. *Brewster*, 408 U.S. at 526; *United States v. Chen*, 754 F.2d 817, 825 (1985). Defendant Hurley's lack of authority to guarantee a favorable result is entirely irrelevant because the core issue is whether defendant Hurley agreed to act a certain way in return for the money, *United States v. Hurley*, 192 F.2d 297, 300 (4th Cir. 1951) ("[U]nder Section 201, it is immaterial that the briber does not have the power of decision to accomplish the result which the offeror of the bribe desires."); *Krogmann v. United States*, 225 F.2d 220, 225 (6th Cir. 1955) (explaining that Section 201 "is applicable to a situation where the advice and recommendation of the Government employee involved would be influential in securing the decision desired by the persons offering the bribe, even though the employee did not have the authority to make the final decision").

Similarly, it is not a defense that defendant Hurley did not actually intend to be influenced. "An officer can act corruptly without intending to be influenced; the officer need only 'solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act.'" *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir. 2009) (quoting *United States v. Arroyo*, 581 F.2d 649, 652 (7th

1 Cir.1978). The statutory requirement that the public official was influenced or induced
 2 to act in a certain way does not describe the official's subjective intent; instead, it
 3 describes the intention conveyed to the briber. Thus, the statute is violated "by giving
 4 false promises of assistance to people he believed were offering him money to influence
 5 his official actions." *United States v. Myers*, 692 F.2d 823, 842 (2d Cir. 1982) (footnote
 6 omitted).

7 **D. Defendant Hurley Still Committed Bribery By Accepting Payment After the**
 8 **Official Act Was Completed**

9 As indicated above, the government will establish at trial that defendant Hurley's
 10 official act was the submission and defense of his audit examination work papers. The
 11 government will show that defendant Hurley solicited, and Mr. Kunkel agreed to pay, the
 12 bribe on September 11, 2015. Defendant Hurley subsequently submitted his audit work
 13 papers on September 15, 2015. Defendant Hurley did not receive payment for the bribe
 14 until September 16 and September 21, 2015.

15 There is nothing in the bribery statute that requires a bribery payment be made
 16 *before* the official act is taken. To the contrary, courts have routinely found that statute
 17 permits a conviction for bribery where the payment of the bribe is made *after* the official
 18 act is undertaken. *See United States v. Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982)
 19 ("The bribery statute proscribes offers and promises of bribes as well as the giving of
 20 bribes, and it is only logical that in certain situations the bribe will not actually be
 21 conveyed until the act is done.") (footnote omitted); *United States v. Jennings*, 160 F.3e
 22 1006, 1014 (4th Cir. 1998) (explaining that bribes can be conveyed after the official act is
 23 completed) (citing *Campbell*, 684 F.2d at 148).

24 In *United States v. Gatling*, 96 F.3d 1511 (D.C. Cir. 1996), for example, one of the
 25 defendants challenged whether there was sufficient evidence for the jury to find she
 26 accepted a bribe rather than a gratuity. 96 F.3d at 1518. In finding that there was
 27 sufficient evidence of bribery, the D.C. Circuit noted that the fact that the defendant had

1 agreed to undertake the official act before she was offered the bribe was not
2 determinative. The court explained, “[t]iming is not determinative of whether a payment
3 constitutes a bribe or a gratuity, since ‘[t]he statute proscribes offers and promises of
4 bribes as well as the giving of bribes, and it is only logical that in certain situations the
5 bribe will not actually be conveyed until the act is done.’” (quoting *Campbell*, 684 F.2d at
6 148). Consistent with *Gatling* and the above cases, it is not a defense that defendant
7 Hurley received the money after he submitted his audit examination work papers.

8 **E. Defendant Hurley’s Assertion of an Entrapment Defense**

9 Defendant Hurley has indicated that he will assert an entrapment defense at trial.
10 The government wishes to alert the Court to several substantive issues associated with the
11 assertion of this defense.

12 As a preliminary matter, to date, the defense has failed to outline any facts that
13 would support the giving of an entrapment instruction. In order to receive an instruction
14 on the entrapment defense, defendant Hurley must assert sufficient facts alleging that he
15 was (1) induced to commit the crime by a government agent; and (2) not otherwise
16 predisposed to commit the crime. *See United States v. Spentz*, 653 F.3d 815, 818 (9th
17 Cir. 2011) (citing *United States v. Barry*, 814 F.2d 1400, 1401 (9th Cir. 1987)). The
18 evidence of inducement and lack of predisposition may be slight, *Spentz*, 653 F.3d at 818,
19 but “[a] defendant is not entitled to have the issue of entrapment submitted to the jury in
20 the absence of evidence” demonstrating both elements. *United States v. Rhodes*, 713
21 F.2d 463, 467 (9th Cir. 1983).

22 Inducement is the threshold issue in any entrapment defense. The law is clear that
23 any inducement must be conducted by the government or its agent. *Spentz*, at 818.
24 Typically, “inducement can be any *government conduct* creating a substantial risk that an
25 otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent
26 representations, threats, coercive tactics, harassment, promises of reward, or pleas based
27

1 on need sympathy or friendship.” *United States v. Williams*, 547 F.3d 1187, 1197 (9th
 2 Cir. 2008) (citing *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994) (emphasis
 3 added)).

4 Defendant Hurley has not -- and cannot -- identify any evidence that there was
 5 inducement by a government agent for two reasons. First, there is no indication that there
 6 was any “inducement” in this case. Defendant Hurley was not coerced, harassed, or
 7 promised a non-criminal reward. It is important to note that the \$20,000 paid to
 8 defendant Hurley cannot constitute the “inducement” needed to establish the entrapment
 9 defense because the money is the “prototypical criminal motivation for” the crime of
 10 bribery. *Spentz*, 653 F.3d at 819. As explained by the Ninth Circuit:

11 The entrapment defense is meant to prevent the government from
 12 convincing someone who will not be persuaded by criminal motivations to
 13 commit a crime. *See Sherman*, 356 U.S. at 372, 78 S.Ct. 819 (“To
 14 determine whether entrapment has been established, a line must be drawn
 15 between the trap for the unwary innocent and the trap for the unwary
 16 criminal.”). When the motivation presented by the government is the
 typical benefit from engaging in the proposed criminal act, there is no
 reason to be concerned that an innocent person is being entrapped

17 *Id.* (footnote omitted).

18 Second, and equally as important, defendant Hurley cannot establish that a
 19 government agent induced the commission of the offense. When defendant Hurley
 20 solicited the payment or agreed to receive the payment from Mr. Kunkel on September
 21 11, 2015, Mr. Kunkel was not operating at the direction of law enforcement in any
 22 fashion. In fact, Mr. Kunkel did not contact law enforcement until *after* September 11,
 23 2015. The involvement of law enforcement in the subsequent meetings is immaterial
 24 because the audio and video recordings that took place at the direction of law
 25 enforcement were made *after* defendant Hurley had solicited or agreed to receive a bribe.

26 Even if defendant could show government inducement, there is substantial
 27 evidence that defendant Hurley was predisposed to commit the crime. The predisposition

1 inquiry focuses upon whether the defendant “was an unwary innocent or, instead, an
2 unwary criminal who readily availed himself of the opportunity to perpetrate the crime.”
3 *Mathews v. United States*, 485 U.S. 58, 63 (1988). Predisposition may exist even in the
4 absence of prior criminal involvement: “the ready commission of the criminal act,” such
5 as where a defendant promptly accepts an undercover agent’s offer of an opportunity to
6 buy or sell drugs, may itself establish predisposition. *Jacobson v. United States*, 503 U.S.
7 540, 548 (1992).

8 In the Ninth Circuit, a jury must consider five factors to determine predisposition:
9 (1) the character or reputation of the defendant, including any prior criminal record;
10 (2) whether the government initially made the suggestion of criminal activity; (3) whether
11 the defendant engaged in criminal activity for profit; (4) whether the defendant evidenced
12 reluctance to commit the offense that was overcome by repeated government inducement
13 or persuasion; and (5) the nature of the inducement or persuasion applied by the
14 government. *Williams*, 547 F.3d at 1198. No single factor is dispositive, but “the
15 defendant’s reluctance to engage in criminal activity is the most important.” *Id.* (quoting
16 *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986).

17 The United States does not believe that defendant Hurley can establish that he
18 lacked predisposition to commit the offense of bribery. First, as discussed above, the
19 government did not induce the defendant’s conduct, and therefore, the United States
20 believes that defendant Hurley cannot show any evidence supporting factors 2, 4, and 5
21 above. Second, the defendant’s character and the fact that he engaged in the criminal
22 activity for profit also weigh against the defendant’s efforts to show lack of
23 predisposition. Specifically, the defendant engaged in the criminal activity in order to
24 enrich himself by soliciting and receiving \$20,000 in cash.

25 If defendant Hurley does, in fact, assert an entrapment defense at trial, the United
26 States intends to present evidence that he was predisposed to commit the crime, including
27 evidence of defendant Hurley’s character and reputation. If defendant Hurley makes any

1 statements regarding entrapment in the defense's opening statement or through evidence
2 elicited through cross-examination of the government's witnesses, he will have opened
3 the door to such evidence.¹

4 If defendant Hurley opens the door to the entrapment defense, the United States
5 intends to introduce the following predisposition evidence: (1) defendant Hurley abused
6 his position as an IRS agent by engaging in the unauthorized access of taxpayer data on
7 the IRS's Integrated Data Retrieval System on a number of occasions and was notified
8 that he may suffer discipline as a result of that violation; (2) defendant Hurley was
9 sympathetic to the marijuana industry as demonstrated by his relationship with, and
10 statements about, people involved in the industry; and, (3) defendant Hurley was
11 predisposed to violate the IRS' code of ethics as evidenced by an incident where he left
12 work to watch a World Cup match at a bar, and when Dianne Whittman confronted about
13 his absence, defendant Hurley fabricated a story about having to rush to the hospital. The
14 United States will also argue that the prompt manner in which defendant Hurley received
15 the money -- as depicted on the audio and video records -- shows that he was predisposed
16 to commit the crime.

17 It should be noted, however, that the mere fact that defendant Hurley puts the
18 entrapment defense into play at trial does not entitle him to an entrapment instruction.
19 Accordingly, defendant Hurley may create a situation where he has opened the door to
20 the admission of character and reputation evidence but is not entitled to have the jury
21 instructed on the defense.

22 **F. Reference to the Penalties that Defendant Hurley Faces**

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24

25

26 ¹ If defendant Hurley opens the door to the entrapment defense late in the government's
27 case-in-chief but does not present a defense case, the United States requests the
28 opportunity to recall witnesses to present evidence regarding the defense.

1 It would be improper for the defense to make any reference to defendant Hurley's
 2 potential sentence during all phases of the trial (including jury selection, opening
 3 statements, examination of witnesses, including the defendant if he elects to testify, and
 4 summation). References to penalties could be as overt as "You understand the defendant
 5 is facing decades in prison if convicted," or more subtle, such as "the defendant is facing
 6 a lot of time," "this case has serious consequences for the defendant," "the defendant's
 7 liberty is at stake in this trial," or "your decision will have consequences for a long time
 8 to come." Or the references could relate to the differences between the statutory
 9 penalties for bribery and its lesser included offense, gratuity. All such references are
 10 improper.

11 "It has long been the law that it is inappropriate for a jury to consider or be
 12 informed of the consequences of their verdict." *United States v. Frank*, 956 F.2d 872,
 13 879 (9th Cir. 1992); *see also Rogers v. United States*, 422 U.S. 35, 40 (1975) (jury should
 14 have been admonished that it "had no sentencing function and should reach its verdict
 15 without regard to what sentence might be imposed"); *United States v. Reed*, 726 F.2d
 16 570, 579 (9th Cir. 1984) (trial judge properly instructed jury that the "punishment
 17 provided by law for the offenses charged in the indictment are matters exclusively within
 18 the province of the court. It should never be considered by the jury in any way in
 19 arriving at an impartial verdict as to the guilt or innocence of the accused").
 20 Information about penalties draws the attention of the jury away from its chief function as
 21 the trier-of-fact, opens the door to compromise verdicts, and confuses the issues to be
 22 decided. *United States v. Olano*, 62 F.3d 1180, 1202 (9th Cir. 1995). Simply put, "it is
 23 inappropriate for a jury to consider or be informed of the consequences of their verdict."
 24 *United States v. Frank*, 956 F.2d 872, 879 (9th Cir. 1991); *see also* 9th Cir. Model Crim.
 25 Jury Instr., § 7.4 (2010) ("The punishment provided by law for this crime is for the court
 26 to decide. You may not consider punishment in deciding whether the government has
 27 proved its case against the defendant[s] beyond a reasonable doubt."). Accordingly, it

would be improper for the defense to make any reference to defendant Hurley's potential punishment in the presence of the jury at any point in the proceedings.

V. EVIDENTIARY ISSUES

A. Statements of Defendant

The United States intends to introduce evidence regarding statements made by the defendant, including the statements made by defendant Hurley: (1) to Mr. Kunkel throughout the examination, and on September 11, 16, and 21, 2015: (2) on IRS forms completed by defendant Hurley during the examination, and (3) to the IRS in his resignation letter. A defendant's own statements are admissible, non-hearsay admissions of a party-opponent when offered into evidence by the United States. *See* Fed. R. Evid. 801(d)(2)(A).²

The United States may offer all, some, or none of a defendant's statements at trial under Rule 801(d)(2). A defendant, however, cannot use this rule to offer his own prior out-of-court statements. Rule 801(d)(2) is unavailable to the defendant in this case, since he would be the proponent of the evidence and, where he seeks to introduce it, it is not offered against him. *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000); *United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988). As a result, the hearsay rule would bar the defendant from introducing his own prior statements. *United States v. Mitchell*, 502 F.3d 931, 964-65 (9th Cir. 2007). If the defendant wants to tell his side of the story, he must take the stand and testify under oath and be subject to cross-examination. Indeed, even where the United States elicits the inculpatory portion of a defendant's statement from a witness, the defendant is not entitled to elicit the

² The government may also offer IRS documents related to defendant Hurley's audit and his training as an IRS agent as public records under Federal Rule of Evidence 803(8). Diane Wittman and Sara De Anda, both experienced IRS employees with knowledge of the IRS' document retention policies, will authenticate the documents as documents generated or maintained by the IRS.

1 exculpatory portion on cross-examination. *Ortega*, 203 F.3d at 682. The rule of
 2 completeness (Fed. R. Evid. 106) has no place in this analysis since it applies only to
 3 written or recorded statements. *Id.*

4 Furthermore, admission of the defendant's statement to the IRS after his arrest will
 5 not violate his constitutional rights. The Fifth Amendment to the United States
 6 Constitution protects individuals from being compelled to testify against themselves. *See*
 7 U.S. Const. Amend. V. Accordingly, only voluntary statements and confessions may be
 8 admitted at trial. *See* 18 U.S.C. §3501; *United States v. Rowe*, 92 F.3d 928 (9th
 9 Cir.1997). To determine whether a confession or statement is voluntary, the trial court
 10 must analyze the totality of the circumstances. *United States v. Crespo de Llano*, 838
 11 F.2d 1006, 1015 (9th Cir. 1987) (citing *Haynes v. Washington*, 373 U.S. 503, 513 14
 12 (1963)). The standard of proof that the statements were voluntarily made is by a
 13 preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 482 84 (1972); *Crespo*
 14 *de Llano*, 838 F.2d at 1015.

15 There appears to be no dispute that defendant Hurley's statements to the IRS in his
 16 resignation letter do not implicate the Fifth Amendment. First, his statements were made
 17 to his supervisor at the IRS, not to law enforcement. Second, the statements were made
 18 voluntarily, not under questioning from either the IRS or law enforcement.

19 **B. Statements Offered for a Non-Hearsay Purpose**

20 A statement is hearsay if it is (1) an assertion that (2) is made out of court and (3)
 21 is offered to prove the truth of the matter asserted. *See* Fed. R. Evid. 801(c). Many out
 22 of court statements are not hearsay because they either are not assertions, or they are not
 23 offered to prove the truth of the matter asserted. *United States v. Oguns*, 921 F.2d 442,
 24 449 (2nd Cir. 1990) (questions are not assertions and are thus not hearsay). Furthermore,
 25 many statements that meet the definition of hearsay are admissible under one or more of
 26 the many exceptions to the hearsay rule.

1 In this case, the United States may offer out of court statements not to prove the
2 truth of the matters asserted, but merely to give context to the defendant's statements.
3 Therefore, the statements would not constitute "hearsay" within the definition of Rule
4 801. *United States v. Catano*, 65 F.3d 219, 225 (1st Cir. 1995) (informant's part of
5 conversation with agent was not hearsay, because it was offered for context and not to
6 prove the truth of the informant's statements). Specifically, the statements made by Mr.
7 Kunkel to the defendant during the examination and in the audio and video recordings are
8 not hearsay, because they are not offered for their truth, but rather to provide context for
9 the statements made by the defendant.

10 **C. Audio and Video Recordings**

11 In its case-in-chief, the United States intends to offer an audio recording of the
12 meeting between Mr. Kunkel and defendant Hurley on September 16, 2015, and an audio
13 and video recording of the meeting on September 21, 2015.

14 With respect to the September 16th audio recording, the United States intends to
15 offer the portion of the audio recording that spans from shortly before defendant Hurley
16 arrived at the Starbucks to the end of the conversation, a total of approximately sixteen
17 minutes. The United States does not believe that the other portions of the over hour long
18 audio recording are relevant. While the United States intends to offer the sixteen minute
19 portion of the September 16th recording described above into evidence, at trial, the
20 United States intends to play only the portion of the recording where Mr. Kunkel and the
21 defendant engaged in conversation outside the Starbucks since the conversation inside the
22 Starbucks is mostly inaudible. Furthermore, to aid the jury in understanding the
23 September 16th audio recording, the United States intends to present a transcript of the
24 recording on the courtroom screens as the recording is played.

25 Similarly, with respect to the September 21st audio and video recording, the
26 United States intends to offer only the portion of the recording that reflects the meeting
27

1 between the defendant and Mr. Kunkel inside Mr. Kunkel's vehicle as the remainder of
2 the recording is irrelevant.

3 The United States anticipates offering the audio and video recordings of the
4 interactions between Mr. Kunkel and defendant Hurley through the testimony of FBI
5 Special Agent Mark Nakatsu and TIGTA Special Agent Julie Anderson. Special Agents
6 Nakatsu and Anderson can authenticate the video and audio recordings because they were
7 present when Mr. Kunkel was outfitted with the recording devices. Additionally, they are
8 familiar with the voices of Mr. Kunkel and defendant Hurley. Both Special Agents have
9 personally reviewed the audio and video recordings in preparation for trial and confirmed
10 that the voices on the audio and video recordings include Mr. Kunkel's and defendant
11 Hurley's voices. *See* Fed. R. Evid. 901(b)(5). Special Agent Anderson will also testify
12 that the September 21st video is of Mr. Kunkel and the defendant. With respect to the
13 transcript of the September 16th recording, Special Agent Nakatsu has personally
14 reviewed the transcript and confirmed that it accurately reflects the speakers on the
15 recording.

16 Both of the recorded statements are relevant and admissible. As noted above,
17 defendant Hurley's statements are admissible because they are statements of a party
18 opponent. *See* Fed. R. Evid. 801(d)(2)(A). Mr. Kunkel's recorded statements are
19 admissible as non-hearsay because they are not being offered for the truth, but to provide
20 context to defendant Hurley's statements. *See United States v. Whitman*, 771 F.2d 1348,
21 1352 (9th Cir. 1985).

22 **D. The IRS's Notification that Defendant Hurley may be Terminated or**
23 **Otherwise Disciplined is Admissible**

24 At trial, the United States intends to offer evidence of the IRS's July 1, 2015
25 notification to defendant Hurley that he may be removed from the IRS or otherwise
26 disciplined. This evidence is admissible under Rule 404(b) of the Federal Rules of
27 Evidence to prove motive.

1 **E. Mr. Kunkel's Attorneys as Witnesses**

2 Robert Chadwell, Mr. Kunkel's attorney, has notified the United States that
3 defendant Hurley may seek to call Mr. Chadwell, and his associate, Jack Guthrie, as
4 witnesses at trial. The United States is aware of the defendant's right to call witnesses to
5 present evidence at trial. However, the United States feels compelled to bring this to the
6 Court's attention because Mr. Chadwell has informed the United States that his client has
7 not agreed to waive attorney-client privilege with respect to communications between
8 Mr. Kunkel and Mr. Chadwell or Mr. Guthrie. Therefore, the United States believes that
9 defense counsel should be prohibited from asking any questions that may encroach on the
10 privilege.

11 **F. Exclusion of Witnesses**

12 Pursuant to Rule 615 of the Federal Rules of Evidence, the government
13 respectfully requests that witnesses be excluded from the courtroom, with the exception
14 of FBI Special Agent Mark Nakatsu and TIGTA Special Agent Julie Anderson, who are
15 the case agents and who should be permitted to sit at counsel table. *United States v.*
16 *Thomas*, 835 F.2d 219, 222-23 (9th Cir. 1987); *see also United States v. Machor*, 879
17 F.2d 945, 953-54 (1st Cir. 1989).

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1 **VI. CONCLUSION**

2 The United States is not aware of other legal issues that are likely to arise during
3 the course of this trial. If other issues do arise, the government requests the opportunity
4 to address those issues by way of a supplemental brief or briefs.

5 DATED: this 29th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

s/ Dru Mercer

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